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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF,
*Plaintiff in error,*
*vs.*
THE UNITED STATES.
In error to the District Court of the United States for the Northern District of Illinois.

221
No. ~~679~~, October Term, 1902.
No. 221, October Term, 1903.

FREDERICK J. SCHICK,
*Plaintiff in error,*
*vs.*
THE UNITED STATES.
In error to the District Court of the United States for the Northern District of Illinois.

222
No. ~~680~~, October Term, 1902.
No. 222, October Term, 1903.

WILLIAM BROADWELL,
*Plaintiff in error,*
*vs.*
THE UNITED STATES.
In error to the District Court of the United States for the Northern District of Illinois.

223
No. ~~676~~, October Term, 1902.
No. 223, October Term, 1903.

## REPLY BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
*Of counsel.*

Washington, October Term, 1903.

[18,842, 18,843, 18,844, 18,952.]

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[18,842, 18,843, 18,844, 18,952.]

## OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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| AUGUST CLIFF, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois. | No. 614, October Term, 1902. No. 221, October Term, 1903. |
| FREDERICK J. SCHICK, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois. | No. 615, October Term, 1902. No. 222, October Term, 1903. |
| WILLIAM BROADWELL, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois. | No. 616, October Term, 1902. No. 223, October Term, 1903. |

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

The brief filed on behalf of the United States would seem to contend, that because the act of Congress in question purports upon its face to be an exercise of the taxing power, "the appeal lies alone to the people and not to the courts" (Gov. brief, p. 25). In other words, the argument amounts to this, that although the object sought to be accomplished by Congress may have been one clearly not entrusted to

the national government, nevertheless if that object can be accomplished by means of adopting the form of a tax law, the citizen is remediless. Thus, the mere form, and not the substance, is to control in determining the validity of the exercise of the taxing power. The position of the Government on this point apparently is that Congress may, by a prohibitory or discriminating tax, or, as it is now called, a "regulatory tax," destroy the internal manufactures of a State and thereby indirectly accomplish what Congress could not do directly. This corollary of the argument on behalf of the Government is said to be supported by the decisions of this Court in regard to the taxing power of Congress.

The plaintiffs in error, however, confidently submit that if this court shall be convinced that the object sought to be accomplished by the act of Congress in question was not taxation but prohibition of the manufacture of a legitimate article of commerce, such object to be determined by the practical operation and necessary effect of the legislation, it will declare the act unconstitutional as to the internal commerce of the States, and apply again the great principle of constitutional jurisprudence that the substance and not the shadow, the truth and not the pretense, ever determines the validity of any exercise of power by Congress as well as by any state legislature, and "that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." This was the language of Mr. Justice Brewer *in speaking of the taxing power of Congress*, in the recent case of *Fairbank* v. *United States*, 181 U. S. 283, 294,

295, 300, and so, too, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, Chief Justice Marshall was discussing the taxing power of a State, and conversely, the taxing power of Congress, when he said:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In *Norwood* v. *Baker*, 172 U. S. 269, 278, Mr. Justice Harlan said:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property."

Judge Cooley, in his great work upon Constitutional Limitations (7th ed.), said (pp. 695, 705):

> "Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax, and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government. . . .
>
> If either of these questions is answered in the negative, the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is, therefore,

> unconstitutional and void. 'The power of taxation,' says an eminent writer, 'is a great governmental attribute, with which the courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.'"[1]

In *Patton* v. *Brady, Executrix*, 184 U. S. 608, 621, Mr. Justice Brewer quoted the following from Cooley on Taxation, p. 34:

> "But so long as the legislation is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional rights of the citizen are violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority."

This language clearly recognizes that, if the court be satisfied that tax legislation is colorable merely and is not in its nature strictly a tax law, there is no reason why the court should decline to adjudge according to the truth.

It is hardly meeting the argument of the plaintiffs in error to suggest that it is based "upon some notion of an implied limitation on Congress, inherent in that instrument, or upon some implied power in this court to review the legislative action in laying a tax" (Gov. brief, p. 23). The limitation upon Congress as to the internal manufactures of the States is not a notion, nor does it arise by implication: it is expressed in the plain command of the Tenth Amendment, which reserves to the States the regulation of their internal commerce as one of "the powers not delegated to the United States by the Constitution." No one on behalf of the plaintiffs in error has consciously suggested that there is any

[1] Sedgwick on Const. and Stat. Law, 414.

implied power in the court to review legislative action in laying a tax, but it is asserted that Congress by labelling an enactment a tax law cannot thereby place itself above the law and the Constitution that is supreme over all legislative powers or withdraw its authority by means of a tax law, and that the courts "are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." Since *Marbury* v. *Madison*, 1 Cranch, 137, 178, it has been undisputed that "this is of the very essence of judicial duty." It is not to be announced that there is so much judicial duty if the legislation purports to be a tax law or an amendment of what this court has held to be a tax law.[1]

The Constitution of the United States protects the individual against the irresponsible or arbitrary exercise of power by any branch of the national government, and Congress is not above the law nor supreme in the exercise of any power. *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *United States* v. *Lee*, 106 U. S. 196, 220.

As Mr. Justice Brewer said in *Cutting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 84:

> "It has been widely and rightly said that this is a government of laws and not of men; that there is no arbitrary power lawfully in any individual or body of individuals; but that all its authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

[1] Mr. Justice Harlan in *Hepburn* v. *Griswold*, 8 Wall. 603, 625.

The plaintiffs in error are pleading in this court for the right to pursue a legitimate trade by honest methods, and they deny the right of Congress to interfere with them and suppress their business on the ground that other manufacturers or retail dealers are guilty of fraud. They have cheerfully submitted to the most drastic regulations for the prevention of fraud; they favor the present rigid regulations of the Treasury Department which practically prevent fraud and protect the consumer against imposition; they simply want to be allowed to follow their trade and obtain their livelihood in the manufacture of what this court has declared to be a legitimate article of commerce, which is recognized as such in every country in the world, and which has created no adverse criticism except where it has competed with butter, and there solely because it is a wholesome and economical substitute for butter.

II.

It is not necessary to follow the Solicitor-General through the door which he would open "*pro arguendo* to facts properly excluded by the courts below" (Gov. brief, p. 58). The matters that he thereupon submits to this court would indeed be most prejudicial to the plaintiffs in error in any other forum than a court of justice. It is true that some persons engaged in the oleomargarine industry have been guilty of fraud; it is true that much prejudice exists in certain quarters against oleomargarine; it is true that much class legislation has been secured in numerous States of an unfair and oppressive character; it is true that prohibitory legis-

lation is to be found in many States, and that in other States there are enactments against fraud. But are these proper elements in the determination of the present question arising under the Constitution of the United States? Is the validity of this act of Congress, as a tax law pure and simple, to depend upon the fact that the commodity taxed and to be destroyed is fostered or discriminated against by any of the States? Is it possible that it is intended to suggest that if a majority of the States favored the industry, the result would be different? Is the suggestion to be entertained that a prohibitory or discriminatory or regulatory tax (to use the words of the Solicitor-General) should be upheld because the legislatures in twenty odd States seek the destruction of a competitive industry, but that the tax would be unconstitutional if these same States were favoring and fostering the industry? Is the constitutionality of an act of Congress then to depend, not on the Constitution, but on the ever varying enactments of the state legislatures? Suppose that all the laws and local regulations which are collected in the appendix to the brief of the Solicitor-General were repealed, would the act of Congress then become unconstitutional in so far as it regulated and destroyed internal commerce?

It will, however, be assumed as elementary that the determination of the question of the power of Congress to impose a "prohibitory," "regulatory" or "discriminating" tax cannot be affected one way or the other by what some of the States have seen fit to enact.

## III.

A number of state statutes against frauds in the manufacture and sale of oleomargarine and food products are tabulated in an appendix to the brief of the United States.

It is difficult to perceive any fair purpose in this tabulation, for in the cases at bar there is not the remotest foundation for any suggestion of fraud. The proofs show that the plaintiffs in error in each case were selling oleomargarine in its commercial form and color for what it was with full disclosure, and that the purchaser or consumer was buying it as and for what it was.

This part of the argument of the Solicitor-General is addressed to the point that Congress was justified, as a matter of morals, in levying a prohibitory tax so as to "make it next to impossible to continue the business" (Gov. brief, p. 91). Now, if this act is to be sustained on the ground that Congress has the power to prohibit internal manufacture in an article of commerce in order to prevent fraud, then we have utterly misconceived the nature of the Federal Constitution and the purport of the decisions of this court, which were supposed to settle beyond peradventure that Congress had no power whatever to regulate the local manufactures of a State or to protect the people of the States against fraud in their internal commerce. We had supposed that if, under the constitution of Illinois, as interpreted by her courts, we had the right to pursue a legitimate business by honest methods, the Federal Congress could not validly enact any regulation which would "make it next to impossible to continue the business" in that State.

Indeed, it may impress this court, as it has profoundly impressed us, that much of the argument of the Solicitor-General virtually confesses that the tax is discriminating and prohibitory, but seeks to sustain it because the industry is unpopular or oppressed in many of the States, and, therefore, "Congress was justified in laying the discriminating tax upon the colored article" (Gov. brief, p. 57). On the other hand, it must be admitted that we had hardly anticipated that an attempt would be made to uphold the act of Congress in question by an argument based upon the police power of the States, as to which it has yet to be held that Congress has any concurrent function whatever. It is a surprise to find the act defended upon the ground that the health and morals of the people will be conserved, because "even if [oleomargarine] is candidly *sold* for what it really is, it is likely to be unwittingly *consumed* for the genuine article which it resembles. Thus the line is drawn between legitimate commerce and trade which, even if recognized, is at least disingenuous and doubtful" (*ib.*, p. 58). The italics are those of the Solicitor-General. Is it seriously contended that Congress may draw a line between the legitimate or illegitimate *internal* commerce of the States, whatever may be said of its power in that regard when regulating *interstate* commerce?

## IV.

In order to maintain the point that the act in question does not encroach upon the powers reserved to the States, the most insistent argument of the Solicitor-General is based upon the fact that in forty-two of the

fifty-four States and Territories stringent laws have been enacted to prevent the sale of oleomargarine as and for butter, and that in twenty-nine (correctly twenty-five) of those forty-two States and Territories the admixture of artificial coloring matter in oleomargarine is prohibited (Gov. brief, p. 59). The Government's proposition when analyzed is that, because nearly all of the States and Territories now have laws to prevent fraud in the sale of this article, as well as of other articles of commerce, and because nearly half of them have laws forbidding artificial coloration, it is competent for Congress to lay a prohibitive tax upon all yellow oleomargarine. The mere statement of this proposition is as clear a demonstration of the soundness of the position of plaintiffs in error as could be desired. For the result would be that, while the act of Congress stands, the internal policy of over one-half the States and Territories in permitting and fostering the manufacture and sale of colored oleomargarine is to be directly overthrown and the laws enacted for the purpose simply of insuring the sale of oleomargarine without fraud, are rendered wholly nugatory.

As a concrete illustration, upon which the learned Solicitor-General places much reliance, reference is made to the laws of Ohio and Illinois, wherein the packages of oleomargarine involved in the cases at bar were manufactured and sold. As to the policy of Ohio in prohibiting colored oleomargarine, it is sufficient to say that, in the face of the present act of Congress, the State of Ohio is powerless to adopt the policy of a number of its sister States and permit the sale of colored oleomargarine under proper restrictions.

Congress was not given the power by the Constitution to render the state of Ohio impotent in this respect. On the contrary, such power was expressly denied to Congress by the reservation in the Tenth Amendment of power to the States to deal as they might see fit with their internal concerns. As to the law of Illinois, the Solicitor-General has fallen into a serious error. That State does not prohibit but freely permits the manufacture and sale of oleomargarine, colored as butter is colored, as a substitute for and in competition with butter. On June 14, 1897, the legislature of Illinois passed an act permitting the sale of oleomargarine under restrictions calculated to prevent its sale as or for butter, and also prohibited the sale of oleomargarine containing any coloration which causes it to resemble yellow butter. Laws Illinois, 1897, pp. 3–5. As to the prohibition, however, the act was held unconstitutional by the Circuit Court of Cook County as a deprivation of liberty and property without due process of law, because the effect of its operation showed that this was the object which it was calculated to accomplish and did accomplish. *People ex rel. Moxley* v. *Pease*, 30 Chicago Legal News, p. 277, April 16, 1898. No further *bona fide* attempt has been made to enforce the prohibitive feature of this act (see *McAdam* v. *The People*, 179 Ill. 316); and no further legislation of a similar character has been attempted. Evidently the remainder of the act was found to afford complete and adequate protection to the public against injury and fraud. It provides for the branding of every package with "the word 'oleomargarine,' or the word 'butterine,' or the words 'substitute for butter,' or the words 'imitation

butter,' in printed letters in plain Roman type, each of which shall not be less than three-quarters of an inch in length" (sec. 3). Every person buying oleomargarine must be informed of the nature of the substance (sec. 4). Every package of oleomargarine shipped, consigned or forwarded by any common carrier must be branded as before provided and it must "be consigned by the carriers and receipted for by its true name" (sec. 5). No person shall be allowed to have in possession or under control any package of oleomargarine, except for personal consumption or that of his family (secs. 6 and 7). No action shall be maintained upon any sale or contract made in violation of or with intent to violate this act (sec. 8). It is a misdemeanor to "deface, erase or remove any mark provided by this act, with intent to mislead, deceive, or to violate any of the provisions of this act" (sec. 9). Offenses against this act are punishable by fine and imprisonment; and the fine is recoverable "before any justice of the peace in the county where the offense shall be committed, at the instance of any person," and the state's attorney of each county is allowed $10 for each prosecution (secs. 10 and 11). Under the freedom thus afforded of manufacturing and selling wholesome oleomargarine for what it really is to persons, who cannot afford to buy butter of the same quality at a higher price, the industry in Chicago has prospered without injury to any one. As illustrations, the Moxley plant, at which the packages involved in these cases were manufactured, had grown to a capacity of three to four million pounds per month (*Cliff* record, p. 19); and Amundsen, a retail dealer who obtained his supplies from the Moxley

Company, had worked up a business among the laboring classes of Chicago amounting to 2,600 pounds per week. These customers "knew that it was oleomargarine and not butter, and they bought it because it was cheaper than butter." But, when the act of Congress now in question went into effect on July 1, 1902, this business was destroyed in so far as it competed with butter. Thereafter, only the uncolored article could be sold to be used for cooking purposes as a substitute for lard (*ib.*, pp. 17, 18, 19).

If it be established that the indirect prohibition of oleomargarine in so far as it competes with butter is within the powers given to Congress, all of these permissive regulations in so many States, and particularly in Illinois, are at once nullified by force of this act, which, under the guise of taxation, prevents the sale of oleomargarine in competition with butter.

V.

The fundamental and controlling allegation tendered to the United States for trial in each case was that the act was prohibitory in its practical operation and effect upon the internal commerce of the States, and that the court would thereby determine the validity of the law. The issue tendered by that allegation was duly tried in the Illinois cases and the evidence tended to prove that the tax was prohibitory. In the case from Ohio, the allegation of the complaint or declaration that oleomargarine cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid was admitted by the demurrer. *McCray* record, pp. 3–5.

The position then taken by the Government was

that the fact of prohibition was immaterial; and now we are met with a complete change of front by the contention that the effect of the tax is not prohibitory, but that it can be paid and the business nevertheless can be conducted at a profit.

The plaintiffs in error must insist upon disregarding many of the alleged facts sought to be imported into the case by the brief of the Solicitor-General, and they earnestly dispute the right of the Government to go outside the records. They challenge the correctness of the statement that "although this information was furnished informally, there can be no valid objection to its relevancy or accuracy" (Gov. brief, p. 83). They do so only because access to the records in the office of the Commissioner of Internal Revenue has been denied to them since the receipt of the brief on behalf of the Government, and, therefore, they have had no fair opportunity to verify the facts. They have thus been denied the right to show, if such be the fact, that practically all of the ten cent tax collected was paid under protest pending this litigation, and that the greater part, if not all, of the colored oleomargarine said to have been manufactured either paid the ten cent tax under protest or was exported to foreign countries under section 16 of the act, which exempts exports from payment of the tax.

The Solicitor-General, in an attempt to minimize the destructive effect of the act of May 9, 1902, cites figures from the Commissioner's records (Gov. brief, p. 83), to show that the decrease in production during the first fiscal year under the new act as compared with the last fiscal year under the old act was

only 51,896,415 pounds. He shows that under the new act 71,237,438 pounds were produced as compared with 123,133,853 pounds produced under the old act. *Prima facie*, these figures seem to indicate a falling off in production of only about 42 per cent., but the Solicitor-General omits to show that the figure of 123,133,853 pounds refers to the tax-paying colored oleomargarine only, and does not include the figures for the uncolored article. When explained by facts which the Commissioner's records do not fully contain, the figures exhibit a result far more destructive even than that conceded by the Government. These facts are contained in the records of each of these cases, and, in connection with the Commissioner's records, they demonstrate that the actual falling off in the production of the colored oleomargarine during the first year under the new act was not from 123,133,853 pounds to 71,237,438 pounds, a decrease of 51,896,415 pounds, or about 42 per cent., but a falling off from 123,133,853 pounds to 2,719,422 pounds, a decrease of 120,414,431, or nearly 98 per cent. The Commissioner's records cited in the Government's brief (p. 83), show that, of the 71,237,438 pounds of oleomargarine produced during the first fiscal year under the new act, only 2,719,422 pounds were colored like butter, on which the tax was paid at the rate of ten cents per pound, while the remaining 68,490,992 pounds was uncolored, on which the tax was paid at the rate of one-fourth of one cent per pound. The point made by the plaintiffs in error in this connection is that the act operates to destroy the oleomargarine industry, in so far as oleomargarine competes with butter, and the record in each case shows that oleomargarine competes with

butter only when it is colored as butter is colored. Otherwise, it is sold only in competition with lard. The reasons for this are that both butter and oleomargarine must be colored to the same standard shade of yellow in order to satisfy the demand of consumers, that oleomargarine cannot be so colored without subjecting it, under the rulings of the Commissioner, to the tax of ten cents per pound, that if so colored there is a substantial demand for oleomargarine, as such and on its own merits, by those consumers who cannot afford to pay high prices for butter, and that if not so colored there is no demand for oleomargarine except for cooking purposes as a substitute for lard. *Cliff* record, pp. 8–21; *Schick* record, pp. 8–19; *Broadwell* record, pp. 8–19; *McCray* record, pp. 2–5; Principal brief, pp. 7–14.

Counsel for the Government attempts to account largely for the great reduction in revenue effected by the new act by assuming that the rate of tax on one class of oleomargarine was reduced from two cents per pound to one-fourth of one cent per pound (Gov. brief, pp. 83, 92). The truth is, however, that no reduction whatever of the rate of tax was intended or effected by the act, but the one-fourth cent tax was a new levy on a hitherto untaxed article. The argument of the Solicitor-General is that Congress, instead of raising the tax on oleomargarine to the point of prohibition, actually reduced the tax on the only legitimate article from two cents to one-fourth of one cent per pound. But the slightest consideration of the facts will demonstrate that this argument is utterly without foundation. The tax of one-fourth of one cent per pound imposed on oleomargarine free from

artificial coloration, is laid wholly upon an article theretofore free from any tax. The records in these cases show that, prior to July 1, 1902, the date when the new act went into effect, all oleomargarine properly so called was sold as a substitute for butter, and that, therefore, it had to be colored as butter is colored in order to meet the demand of consumers. *Cliff* record, p. 19; *Schick* record pp. 16–17; *Broadwell* record, pp. 16–17. Consequently, not until after July 1, 1902, had there ever been a tax levied upon uncolored oleomargarine. The Solicitor-General concedes this fact in arguing another point. He says (p. 84), citing the *Cliff* record:

> "It must be remembered that prior to the change in the tax practically all oleomargarine was colored yellow."

The records of the Commissioner show no less clearly that the tax of one-fourth of one cent. per pound on uncolored oleomargarine was a new tax never before levied on what is now known as uncolored oleomargarine, a substitute for lard (Preliminary Report of July 23, 1903).

It is clear, therefore, as shown in our principal brief (p. 51), that this oleomargarine which the Commissioner permits to be sold upon payment of only the tax of one-fourth of one cent. per pound is not oleomargarine, properly so-called, within the definition of the act; and that the permission to manufacture and sell uncolored oleomargarine in competition with lard does not obviate the objection that the act destroys the real oleomargarine industry, *i. e.*, that which competes with the butter industry. This disposes of the argument of the Solicitor-General based upon the 68,490,992 pounds

produced during the first year's operation of the new act upon which the tax of one-fourth of one cent per pound was paid, leaving only the 2,719,422 pounds upon which the tax of ten cents per pound was paid. As to this insignificant amount, as compared with the 125,133,853 pounds produced and sold in competition with butter during the preceding year, it should be sufficient to cite the instance of the Moseley factory which, with a previous output of 2,000,000 pounds of colored oleomargarine per month, manufactured none of the colored article during the first five months, and in December, 1902, did sell 37,504 pounds only because of the abnormally high price of butter during that month (*Cliff* record, p. 19).

It is said (Gov. brief, p. 86) that the amount of tax "cuts but little figure," and for instance, that the public will have whiskey and tobacco though the tax is large in proportion to the cost of production, as experience proves. But oleomargarine is plainly different. The public will not have oleomargarine for table use unless it can be had much cheaper than butter. Therefore, a tax which requires oleomargarine to be sold for butter prices or more is prohibitive, while a higher rate on whiskey or tobacco is not.

## VI.

It must be considered that counsel cannot persuade what point decided in the case of *Pollock v. United States*, 158 U. S. 428, as discussed in the opinion of Mr. Justice Brewer, tends to support the power of Congress to lay a prohibitory tax on the internal commerce of a State. The case might

**be in point if Congress was taxing butter and furnishing a certificate as to its quality which the people here and elsewhere could follow in and rely upon. But Congress is not taxing or regulating commerce in butter and the Government is not issuing a certificate. It has shown no concern for the people elsewhere, because it allows oleomargarine to be exported freely without the payment of any tax [illegible].**

[illegible] [illegible] [illegible] [

and are equally palatable, digestible and wholesome. But the existence of this resemblance does not furnish a reason for a prohibitory tax upon oleomargarine when butter is not taxed at all. What possible ground is there then for claiming that Congress is seeking to prevent fraud in the collection of its revenue? As matter of fact, the more colored oleomargarine sold as and for butter the greater the revenue of the Federal Government. Congress could not prohibit the manufacture of colored oleomargarine or punish frauds in its sale. If it wanted revenue, the way was not to lay a prohibitory tax. The moment the Government is driven to contend that this discriminating or regulatory tax was laid in order to prevent the sale of oleomargarine as and for butter, it concedes that the purpose of the law was not taxation but prohibition or regulation.

Appreciating that this horn of the dilemma amounted to a *reductio ad absurdum*, the suggestion is added that the purpose of the tax is to distinguish between colored and uncolored oleomargarine by laying "a heavy tax upon the colored article, inevitably imitative and fraudulent in effect" (Gov. brief, p. 58). If by this is meant that colored oleomargarine taxed ten cents per pound is inevitably imitative of the uncolored article taxed one-quarter of a cent per pound, the statement is at war with the records and well known facts. On the contrary, it has never before in the history of the industry been suggested that colored oleomargarine was imitative of uncolored oleomargarine. Equally preposterous is the suggestion that colored oleomargarine is fraudulent in its effect on uncolored oleomargarine. The brief probably was intended to

state that as colored oleomargarine is imitative of butter and may be sold fraudulently as and for butter, *an untaxed article*, therefore in order to facilitate the collection of revenue on colored oleomargarine, Congress could practically destroy it. Such an argument need only be stated to see at once its utter fallacy.

So, also, as to the statement made in the Government's brief that the debates in Congress "show a belief or conviction that the high tax on colored oleomargarine was necessary and was justified to prevent fraud in the collection of the tax upon the uncolored article; that is, the genuine variety, as it were, of oleomargarine. . . . When an article taxed is made to counterfeit an article not subject to tax, Congress may put upon it a higher tax in order to secure identification of the genuine article against the fraud or counterfeit, which, if successful, evades the tax intended to be imposed upon the genuine article" (p. 63).

Is it not taxing the credulity of the court to argue that, in order to collect a tax of one-quarter of a cent per pound upon uncolored oleomargarine, it was necessary or proper to impose a tax of forty times the amount on colored oleomargarine, which by no possibility could be fraudulently sold for the uncolored article? Equally, is it not unreasonable to expect this court to uphold a "regulatory tax" which seeks to *destroy* a counterfeit or imitation of an *untaxed* article? Whatever fraud has been practised has been with respect to butter; and, in view of the strict supervision exercised by the government over manufacturers, it is unreasonable to suppose that the payment of taxes could be evaded because of the resemblance to

butter or that Congress intended to strike at any such evil.

It is universally recognized that oleomargarine is colored for the same reason that butter is colored and for no other reason: the taste and appetite of the community demand it. White oleomargarine or white butter is distasteful. No logician can analyze or demonstrate what causes or constitutes taste. But the fact remains that taste is often absolutely controlling in human affairs. Whatever the cause may be, the color of food has much to do with its being palatable and marketable, and such a feature is frequently imperative. Too many illogical phases of human life constantly pass before this court for it to close its eyes to the truth that idiosyncrasies of taste or appetite or prejudice govern and control men in innumerable matters. We know that scientists vainly and fruitlessly urge that certain forms of manufactured food are the equivalent of other forms of natural food, but that the masses will not listen. We know that much of the food of peasants of Europe and Asia would be spurned by the poorest and humblest in the United States. We know that one of the most striking and singular features of idiosyncracy of taste and appetite on the part of ignorant peoples is their readiness to starve rather than eat what custom or palate or religion has made distasteful to them. We know that one of the most terrible wars of modern times—the Sepoy insurrection—was caused by religious aversion to an article of food which we regard as wholesome. We know that, if a statute should require beet sugar, which is a substitute for cane sugar, to be sold in its natural

yellow-brown state, the regulation would be practically prohibitive, and that the white sugar of commerce alone is what the poorest laborer demands. We know that, among the wealthy and cultivated classes of Europe, a white butter is preferred to the colored butter, and yet white butter is now generally unsalable in the United States. It is, therefore, reasonable to insist that, if butter must be colored yellow in order to make it acceptable to the taste and appetite of the community and therefore merchantable, so also must oleomargarine be colored for exactly the same reason, because it has no other commercial use or purpose than to serve as a substitute for butter.

VII.

In view of the insistence of the Solicitor-General upon the correctness of the decision of the Commissioner that palm oil constitutes "artificial coloration" within the meaning of Congress, by reason of the smallness of the quantity used in manufacture, it may be desirable to discuss this particular point at greater length than was heretofore deemed necessary.

In the first place, it is erroneously assumed in the Government's brief (p. 100) that the nature of palm oil is such that it can be used only in minute quantities. In this, the positive and uncontradicted testimony of Professor de la Fontaine to the contrary was entirely overlooked. *Cliff* record, p. 12.

The ground upon which the Commissioner holds that the admixture of palm oil having a natural yellow color, constitutes "artificial coloration," whilst the admixture of cotton seed oil or butter having also a natural

yellow color does not constitute "artificial coloration," is that, owing to the high color of the palm oil, only a very small quantity is required to produce the necessary commercial color. *Cliff* record, pp. 9–10; Oleomargarine regulations, p. 18. This distinction is wholly without foundation in reason or authority. It is clearly unreasonable to argue that a natural color may be held an artificial color according to the amount used. The established rules of construction preclude any such result, as we have shown in the principal brief, where the authorities are cited on page 74. But even if it could be supposed that Congress intended such a consequence, it could not delegate to the Commissioner the power to draw the line and to say when the amount of palm oil ceased to be a natural and became an artificial coloration, without abdicating its functions. The reason of this strange discrimination assigned by the Commissioner is that the use of such a small quantity of palm oil evinces a purpose or intent to evade the revenue law. He says (*Cliff* record, p. 10):

> "This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound."

Upon this reasoning the Solicitor-General also bases his argument (brief, pp. 94–102).

It may be possible that, if this question had been submitted to Congress, it would have included in the term "artificial coloration" any substance having such a deep natural yellow color as that only a small amount need be used to attain the requisite commercial color, or, in leaving this matter to the Commissioner, it would have specified the amount of naturally colored oil to be classed with "artificial coloration." Undoubtedly, Congress had no such difficulty in mind, for the use of palm oil was not general until after the enactment went into effect. *Cliff* record, p. 20. There is no law which prevents an evasion of this act provided it can be done without fraud. If, in view of the palm oil question, the legislation of Congress is defective to accomplish the purpose intended, the remedy is one for Congress to apply; it cannot be placed in the hands of the Commissioner.

The decisions do not leave this matter in the slightest doubt. In *Merritt* v. *Welsh*, 104 U. S. 694, it was held that the treasury department had no discretion but to classify the quality of sugar according to its color, although the color test had become entirely inadequate, and although the color of the lower class was imparted in manufacture to the higher class for the very purpose of evading the higher tax. The opinion of the court was delivered by Mr. Justice Bradley, who said (p. 701):

> "The color standard has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties

Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand—that of the polariscope, or other chemical test. If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.'"

And again (p. 704):

"If experience shows that Congress acted under a mistaken impression, that does not authorize the treasury department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws, which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, providing he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to

the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger* v. *Farwell*, 139 U. S. 608, it was expressly held that the introduction of a few cotton threads in woolen cloth for the very purpose of procuring it to be classed as part wool goods, and thus to evade the higher duty on woolen goods, would not permit the collector to classify the goods at a higher rate. The court, by Mr. Justice Blatchford, said (p. 610).

"The court, in its opinion, said that the collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, and assumed also that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate

of duty, the court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

We concur in this view, and the judgment is affirmed."

This decision was followed in *Magone* v. *Luckemeyer*, 139 U. S. 612.

In *United States* v. *Schoverling*, 146 U. S. 76, 81, it was held, following the *Merritt* case, that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States* v. *Irwin*, 78 Fed. Rep. 799, the Circuit Court of Appeals for the second circuit, speaking by Circuit Judge Wallace, said (p. 801):

"Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced sepa-

rately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.

It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws."

And again, after referring to some of the decisions of this court (p. 802):

"Applying these principles to the present case, we cannot escape the conclusion that if the articles in controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments merely for the purpose of escaping the duty upon shotguns."

The principle and language of the opinion in *Morrill* v. *Jones*, 106 U. S. 466, is also directly in point. The court, speaking by Chief Justice Waite, there said (p. 467):

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to pre-

scribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

Applying the *Morrill* case to the oleomargarine act, in *United States* v. *Eaton*, 144 U. S. 677, 687, the court, by Mr. Justice Blatchford, said:

"It was said by this court in *Morrill* v. *Jones*, 106 U. S. 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States."

In *U. S.* v. *200 Barrels of Whiskey*, 95 U. S. 571, 576, holding that a particular construction of the internal revenue law by the Commissioner of Internal Revenue was unwarranted, the court, by Chief Justice Waite, said:

"The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

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CONCLUSION.

It is, therefore, submitted that, as long as due regard is to be had for those principles of constitutional justice which were established in the days of Marshall for the protection of the States against encroachments upon their reserved powers and of the individual against the arbitrary exercise of governmental powers, no act of Congress, be it under the taxing power or otherwise, can be permitted to stand if the court is persuaded that it constitutes an attempt to accomplish an object not entrusted to the national government. Those principles are as effective today to curb Congress and the States and to keep them within their respective spheres as they were when Marshall announced them as the conclusions of this court. "They will always remain. They will stand as long as the Constitution stands. And if that should perish, they would still remain, to display to the world the principles upon which it rose, and by the disregard of which it fell." Phelp's Orations and Essays, 9.

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WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
*of counsel for plaintiffs in error.*